No. _____

In the
Supreme Court of the United States

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. BOX 353020
SEATTLE, WA 98195
(206) 616-3167

ANN BUNTIN STEINER
Counsel of Record
STEINER & STEINER
214 SECOND AVENUE, N.
SUITE 203
NASHVILLE, TN 37201-1644
(615) 244-5063

Attorneys for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800 890 5001

QUESTION PRESENTED

Does the anti-retaliation provision of section 704(a) of Title VII of the 1964 Civil Rights Act protect a worker from being dismissed because she cooperated with her employer's internal investigation of sexual harassment?

PARTIES

The parties to this action are set forth in the caption.

The original complaint also named as defendants two individuals: Dr. Gene Hughes and Dr. Pedro Garcia. The claims against those individuals were dismissed on grounds not related to the question presented. For that reason they are not respondents in this Court.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I. THIS CASE PRESENTS AN ISSUE OF VITAL IMPOTANCE TO THE ADMINISTRATON OF TITLE VII 7

II. THE DECISION OF THE SIXTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS 15

III. THE DECISION OF THE SIXTH CIRCUIT WILL SERIOUSLY IMPEDE ADMINISTRATION OF TITLE VII 20

CONCLUSION 24

APPENDIX

Appendix A - Order of the United States Court of Appeals for the Sixth Circuit Denying Rehearing, March 1, 2007 . . . . . 1a

Appendix B - Opinion of the United States Court of Appeals for the Sixth Circuit, November 14, 2006 . 3a

Appendix C - Order and Memorandum Opinion of the United States District Court for the Middle District of Tennessee, January 6, 2005 . . . . . 11a

TABLE OF AUTHORITIES

Cases

Abbot v. Crown Motor Co., Inc.,
348 F.3d 537 (6th Cir. 2003) 6

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 9

Bell v. Safety Grooving and Grinding, LP,
107 F. App'x 607 (6th Cir. 2004) 5

Burlington Industries, Inc. v. Ellerth,
524 U.S. 742 (1998) 12, 13, 21, 23

Burlington Northern and Santa Fe Rwy. Co. v. White,
126 S. Ct. 2405 (2006) 20

Cardenas v. Massey,
269 F.3d 251 (3d Cir. 2001) 15

EEOC v. Total System Services, Inc.,
240 F.3d 899 (11th Cir. 2001) 21

EEOC v. Total Systems Services, Inc.,
221 F.3d 1171 (11th Cir. 2000) 17

Evans v. City of Houston,
246 F.3d 344 (5th Cir. 2001) 16, 17

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) 10, 12, 13, 14, 23

Hoffman v. Rubin,
193 F.3d 959 (8th Cir. 1999) 17

Jackson v. Birmingham Bd. of Education,
544 U.S. 167 (2005) 20, 21

Jackson v. County of Racine,
474 F.3d 493 (7th Cir. 2007) 22

Jute v. Hamilton Sundstrand Corp.,
420 F.3d 166 (2d Cir. 2005) 21

Kempcke v. Monsanto Co.,
132 F.3d 442 (8th cir. 1998) 17

MacLean v. City of St. Petersburg,
194 F. Supp. 2d 1290 (M.D.Fla. 2002) 19

McDonnell v. Cisneros,
1995 WL 110131 (N.D.Ill. 1995) 19

McDonnell v. Cisneros,
84 F.3d 256 (7th Cir. 1996) 19

Mitchell v. Robert DeMario Jewelry, Inc.,
361 U.S. 288 (1960) 20

NLRB v. Electro Motive Mfg. Co.,
389 F.2d 61 (4th Cir. 1968) 15

NLRB v. Scrivener,
405 U.S. 117 (1972) 20

Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA,
915 F.2d 840 (2d Cir. 1990) 12

Scott v. County of Ramsey,
180 F.3d 913 (8th Cir. 1999) 17

Statutes

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2000e-3 (Section 704(a) of Title VII of the 1964 Civil Rights Act) . . . . . *passim*

Title VII of the 1964 Civil Rights Act . . . . . *passim*

Other Authorities

EEOC, "Retaliation" (undated), available at http://www.eeoc.gov/types/retaliation.html, visited May 23, 2007 . . . . . 9, 23

EEOC Compliance Manual, section 915.003, part 2-II(A)(5), available at http://www.eeoc. gov/policy/docs/threshold.html, visited May 23, 2007 8

EEOC Compliance Manual, section 915.003, part 8-II(B)(1), available at http://www.eeoc. gov/policy/docs/retal.html, visited May 23, 2007 8

Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (No. 915.002, June 6, 1999), part V(C)(1), available at http://www.eeoc.gov/policy/docs/harassment.html, visited May 23, 2007 . . . . . 12, 13

Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 6, 1999), part V(C)(1)(e)(i), available at http://www.eeoc.gov/policy/docs /harassment.html, visited May 23, 2007 10

Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 6, 1999), part V(C)(1)(e)(ii), available at http://www.eeoc.gov/policy/ docs/harassment.html, visited May 23, 2007 12

Policy Guidance on Current Issues of Sexual Harassment, No. N-915.030 (October 25, 1988) 12

Policy Guidance on Current Issues of Sexual Harassment, No. N-915-050 (March 19, 1990), part E(1), available at http://www.eeoc.gov/policy/docs/currentissues.html, visited on May 23, 2007) 12

Brief for Appellant, *Cardenas v. Massey,* No. 00-5225 . 16

Brief for the Secretary of Labor as Amicus Curiae, *Ball v. Memphis Bar-B-Q Company, Inc.,* 228 F.3d 360 (4th Cir. 2000), No. 9901261 (1999 WL 33636931) 15

Brief of the EEOC as Appellant, EEOC v. Total Systems Services, Inc., 221 F.3d 1171 (11th Cir. 2000), No. 99-13196-JJ 13

Reply Brief of the Equal Employment Opportunity Commission as Appellant, *EEOC v. Total Systems Services, Inc.,* 221 F.3d 1171 (11th Cir. 2000), No. 99-13196-JJ . 14

PETITION FOR A WRIT OF CERTIORARI

Petitioner Vicky S. Crawford respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on November 14, 2006.

OPINIONS BELOW

The November 14, 2006, opinion of the court of appeals is reported at 211 Fed. Appx. 373 (6th Cir. 2006), and is set out at pp. 3a-10a of the Appendix. The March 1, 2007, order of the court of appeals denying rehearing, which is not officially reported, is set out at pp. 1a-2a of the Appendix. The January 6, 2005, opinion of the district court, which is not officially reported, is set out at pp. 12a-17a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on November 14, 2006. A timely petition for rehearing and suggestion for rehearing en banc was denied on March 1, 2007. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or

> because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

The question presented in this case is whether, as the Sixth Circuit held, Title VII permits an employer to dismiss an employee because, in the course of an internal investigation of sexual harassment, the employee objected that she herself had been sexually harassed.

The events giving rise to this action arose out of a sexual harassment investigation conducted in 2002 by the Metropolitan Government of Nashville and Davidson County, Tennessee, referred to collectively by the courts below as "Metro". In the spring of 2002, an attorney at the Metro Legal Department learned that several female employees had expressed concern about being sexually harassed by the employee relations director for the Metro School District, Dr. Gene Hughes. Responsibility for investigating possible sexual harassment by Hughes was assigned to Veronica Frazier, the assistant director for human resources. Frazier contacted employees who had worked with Hughes in the Metro administrative offices, and asked them to come to her office to be interviewed. In the course of those interviews, three female employees, including Petitioner Crawford, described serious acts of sexual harassment by Hughes. (App. 4a-5a).

"Crawford told the investigators that Hughes had sexually harassed her and other employees." (App. 5a). Crawford stated that Hughes "would come to my window and ask to see -- he would say, 'Let me see your titties.'" (J.App. 45). He would "grab his crotch and state 'you know what's up,'" and "would approach her window and put his crotch up to the

window." (*Id.*) On one occasion "Hughes came into her office and she asked him what she could do for him and he grabbed her head and pulled it to his crotch." (*Id.*; see App. 5a n.1). Crawford made clear that she strongly objected to this behavior. On one occasion she "told him to get the hell out of my office." (J.App. 45). Crawford characterized her statements to the investigators as "testimony against" Hughes. (JA 47, 53).

At the time that Crawford spoke to the investigators, she was afraid that if she told them about Hughes' sexual harassment "I would lose my job." (JA 47). Those fears were well founded. Within a few months of taking part in the internal investigation, Crawford was suspended and then fired. The two other women who had complained to investigators about being sexual harassment were also fired. (App. 5a). The investigators concluded that Hughes to some degree had acted improperly, but no disciplinary action was taken against him. (App. 5a).

After filing a timely charge with the EEOC, Crawford commenced this action under Title VII in the United States District Court for the Middle District of Tennessee. Crawford alleged that she had been dismissed in retaliation for having told investigators about being harassed by Hughes. That retaliation, she asserted, violated section 704(a) of Title VII.

Metro moved for summary judgment. It argued, inter alia, that it is entirely lawful to dismiss a woman who during the course of an internal investigation complains about sexual harassment. Providing information to a company's own investigators, Metro contended, is not "protected activity" covered by section 704(a), even if the information consists--as

here--of an allegation that the employee had been sexually harassed.[1]

The District Court dismissed the complaint, holding that participation in an employer's internal investigation is not protected by section 704(a). To be protected by section 704(a), it reasoned, a sexual harassment victim must on her own initiative file some sort of formal complaint. Once an employer has initiated an investigation, mere witnesses--even witnesses who object to having been sexually harassed--are outside the protection of section 704(a).

> [P]rotected activity under Title VII does not include participation in internal investigations. . . . In the cases relied upon by Plaintiff . . . the plaintiffs initiated investigations by filing complaints or reporting allegedly unlawful conduct. Here, Plaintiff merely answered questions by investigators in an already-pending internal investigation, initiated by someone else. In her Complaint, Plaintiff alleges that she fully cooperated with Metro's investigation, that

---

[1] Motion for Summary Judgment, p. 7 (JA 39):

> Plaintiff's statements to the sexual harassment investigators do not constitute "protected activity." Plaintiff contends that the statements she made to [the sexual harassment investigators] about Gene Hughes' inappropriate behavior are the "protected activity" which prompted the alleged retaliation against her. However, since she gave these statements during an in-house sexual harassment investigation - which was completed way before she or anyone else filed a formal charge of discrimination with the EEOC - these statements are not "protected activity" as a matter of law.

> she participated in the investigation, that she was questioned by investigators, that she testified unfavorably to Dr. Hughes. There is no allegation that she instigated or initiated any complaint.

(App. 15a-17a). In this case, since the investigation was initiated by the Metro's own Legal Department, all of the sexual harassment victims were merely cooperating witnesses, and thus all the victims could be lawfully dismissed for complaining that they had been harassed.

The court of appeals affirmed. It held, first, that complaining about sexual harassment in response to an internal investigation is not protected by the opposition clause of section 704(a), which forbids retaliation because an employee "has opposed" a violation of Title VII.

> Crawford's actions do not constitute opposition under the meaning of the opposition clause. . . . The general idea is that Title VII "demands active, consisting 'opposing' activities to warrant . . . protection against retaliation." *Bell v. Safety Grooving and Grinding, LP*, 107 F. App'x 607, 610 (6th Cir. 2004).
>
> Crawford's actions consisted of cooperating with Metro's investigation into Hughes by appearing for questioning at the request of Frazier and, in response to Frazier's questions, relating unfavorable information about Hughes. Crawford does not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and

> prior to her firing. This is not the kind of overt opposition that we have held is required for protection under Title VII.

(App. 7a-8a).

Second, the court of appeals held that complaining about sexual harassment in response to an internal investigation is not protected by the participation clause of section 704(a) which forbids retaliation because an employee "testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title." The participation clause, it held, does not apply until and unless the victim or someone else has first filed a charged with the EEOC itself.

> Crawford's participation in an internal investigation initiated by Metro in the absence of any pending EEOC charge is not protected activity under the participation clause. We have held that "Title VII protects an employee's participation in an employer's internal investigation into allegations of unlawful discrimination where that investigation occurs pursuant to a pending EEOC charge." *Abbot* [*v. Crown Motor Co., Inc.*], 348 F.3d [537,] 543 [6th Cir. 2003)]. In Crawford's case, however, no EEOC charge had been filed at the time of the investigation or prior to her firing; the investigation was internal and was prompted by an informal internal statement.

(App. 8a).

The court of appeals reasoned that applying the protections of section 704(a) to sexual harassment victims who speak out during an internal investigation would actually

deter employers from even conducting investigations of possible sexual harassment.

> The impact of Title VII on an employer can be onerous. By protecting only participation in investigations that occur relative to EEOC proceedings, the participation clause prevents the burden of Title VII from falling on an employer who proactively chooses to launch an internal investigation. Expanding the purview of the participation clause to cover such investigations would simultaneously discourage them.

(App. 10a).

Crawford filed a timely petition for rehearing and for rehearing en banc. The petition was denied on March 1, 2007. (App. 1a-2a).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN ISSUE OF VITAL IMPORTANCE TO THE ADMINISTRATION OF TITLE VII

The Sixth Circuit in this case held that the anti-retaliation provisions in section 704(a) of Title VII do not protect an employee who during the course of an employer's internal investigation complains about sexual harassment. Specifically, the court of appeals held that statements by witnesses during such an internal investigation are not protected either by the opposition clause of section 704(a) (which forbids retaliation because an employee "opposed any" practice prohibited by Title VII) or by the participation clause (which forbids retaliation because an employee

"participated in any manner in an investigation . . . under this title.")

The EEOC emphatically construes section 704(a) in precisely the opposite manner. With regard to the opposition clause, the EEOC Compliance Manual explains:

> Protected activity . . . includes testifying or presenting evidence as part of an internal investigation pertaining to an alleged EEO violation. . . . Because encouraging employers to discover and prevent discriminatory practices in the workplace is a primary objective of Title VII, an employee who assists his/her employer in this endeavor is, by definition, opposing practices made unlawful by Title VII.[2]

The application of section 704(a) to participation in an internal investigation follows from the EEOC's general interpretation of the opposition clause of section 704(a).

> This protection applies if an individual explicitly or implicitly communicates to his or her employer or other covered entity a belief that its activity constitutes a form of employment discrimination that is covered by any of the statutes enforced by EEOC.[3]

---

[2] EEOC Compliance Manual, section 915.003, part 2-II(A)(5), available at http://www.eeoc.gov/policy/docs/threshold.html, visited May 23, 2007.

[3] EEOC Compliance Manual, section 915.003, part 8-II(B)(1), available at http://www.eeoc.gov/policy/docs/retal.html, visited May 23, 2007.

The Commission also insists that an employee who cooperates in an internal investigation is protected by the participation clause of section 704(a):

> Participation means taking part in an employment discrimination proceeding. . . . Examples of participation include: . . . [c]ooperating with an internal investigation of alleged discriminatory practices; or . . . [s]erving as a witness in an EEO investigation . . . .[4]

The EEOC has advanced its interpretations of section 704(a) in briefs in the courts of appeals.[5]

This issue is vital to the implementation of Title VII and other federal employment statutes. Although Title VII authorizes aggrieved employees to file suit in federal court, the most important stage of compliance is in the workplace itself. Federal litigation is the enforcement tool of last resort; the overarching purpose of that remedy, and of Title VII, is to induce employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible" unlawful discrimination and its lingering effects. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975). Because the relevant information about discriminatory practices is usually in the hands of an employer's own workers, protecting those workers from

---

[4] EEOC, "Retaliation" (undated). This interpretation of section 704(a) and similarly worded anti-retaliation provisions is available at http://www.eeoc.gov/types/retaliation.html, visited May 23, 2007.

[5] *See* nn. 11 and 13, *supra*.

reprisals is critical to the viability of any employer's internal investigation and review process.

An employer's internal processes for investigating and correcting possible violations of Title VII have a particularly central role in the elimination of sexual harassment. In order to strengthen employers' internal processes for dealing with harassment, this Court has interpreted Title VII to impose strict liability on an employer for a supervisor's discriminatory harassment, subject to an affirmative defense designed "to recognize the employer's affirmative obligation to prevent violations and give credit . . . to employers who make reasonable efforts to discharge their duty." *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998). The protections of section 704(a) are particularly critical with regard to claims of sexual or other harassment. In such cases the alleged harasser will predictably be angered by the harassment allegation, most harassment occurs at the hands of supervisors who are well situated to bring about reprisals against cooperating witnesses, and all too often the witness is under the supervision of the alleged harasser.

The EEOC properly regards statements by witnesses as critical to a sexual harassment investigation. The EEOC advises employers conducting internal investigations to identify any such witnesses[6], provides guidance regarding the

---

[6] Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 6, 1999), part V(C)(1)(e)(i):

> **Questions to Ask the Complainant**:
>
> * * *
>
> --Are there any persons who have relevant information?

questions that should be asked of them[7], and emphasizes the importance of such witnesses in corroborating other

---

> Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
> --Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?

Available at http://www.eeoc.gov/policy/docs/harassment.html, visited May 23, 2007.

[7] *Id.*:

> **Questions to Ask Third Parties**:
> --What did you see or hear? When did this occur? Describe the alleged harasser's behavior toward the complainant and toward others in the workplace.
> --What did the complaint tell you? When did s/he tell you this?
> --Do you know of any other relevant information?
> --Are there other persons who have relevant information?

testimony.[8] Both before[9] and after this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the EEOC has emphasized the particular importance of preventing retaliation against witnesses from occurring in connection with an investigation of sexual harassment. The EEOC's current Policy Guidance admonishes employers to assure "that employees who . . . provide information related to such complaints will be protected against retaliation."[10]

---

[8] *Id.* at part V(C)(1)(e)(ii):

> -- **Corroboration**: Is there *witness testimony* (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) . . . ?
> -- **Past record**: Did the alleged harasser have a history of similar behavior in the past?

[9] Policy Guidance on Current Issues of Sexual Harassment, No. N-915-050 (March 19, 1990), part E(1) (employer must provide "protection of victims and witnesses against retaliation.") Available at http://www.eeoc.gov/policy/docs/currentissues.html, visited on May 23, 2007.

Policy Guidance on Current Issues of Sexual Harassment, No. N-915.030 (October 25, 1988), p.28 (employer must provide "protection of victims and witnesses against retaliation.") This Policy Guidance is quoted in *Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA*, 915 F.2d 840, 845 (2d Cir. 1990).

[10] Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (No. 915.002, June 6, 1999),

The EEOC, which has the primary responsibility for enforcing Title VII, has also concluded that its *own* ability to meet those statutory responsibilities would be seriously impeded if internal-investigation witnesses were not protected by section 704(a).

> Now that the Supreme Court [in *Faragher* and *Ellerth*] has made participation in an employer's internal complaint procedure a virtual prerequisite to recovery, employees involved in internal investigations are playing an essential role in the EEOC's enforcement efforts. If employees are too intimidated to participate freely in internal investigations, the EEOC's ability to enforce Title VII would be seriously compromised.[11]

If in the course of an employer's sexual harassment investigation a harassment victim refuses to answer questions or fails to disclose that she has been harassed, that lack of cooperation may ultimately preclude the EEOC as well as the victim from thereafter obtaining relief under Title VII.

> Given the new emphasis on internal complaint procedures, participation in an internal investigation has essentially become a prerequisite for recovery . . . . Unless an employee has complained to her employer . . . her eventual EEOC charge may be ineffective as a means to remedy illegal harassment. To the extent that the participation clause seeks to

---

part V(C)(1). Available at http://www.eeoc.gov/policy/docs/harassment.html, visited May 23, 2007.

[11] Brief of the EEOC as Appellant, *EEOC v. Total Systems Services, Inc.*, 221 F.3d 1171 (11th Cir. 2000), No. 99-13196-JJ, pp. 17-18.

> protect the EEOC's ability to enforce Title VII, the new legal regime mandates that its protections now extend to participation in an internal investigation of a supervisor's sexual harassment. Absent such protection, employees may be too intimidated to come forward first to their employer and then to the EEOC, and the EEOC's ability to enforce the statute may thereby be compromised.[12]

"Only by making it impossible for employers legally to retaliate against employees who participate in internal investigations can this Court fulfill Title VII's mandate of fully protecting access to EEOC's enforcement machinery."[13]

The Department of Labor has similarly observed regarding claims under the Fair Labor Standards Act that an anti-retaliation provision would often be ineffective if its

---

[12] *Id.* at 12-13.

[13] *Id.*at 14. See Reply Brief of the Equal Employment Opportunity Commission as Appellant, *EEOC v. Total Systems Services, Inc.*, 221 F.3d 1171 (11th Cir. 2000), No. 99-13196-JJ, pp. 3-4 ("The new importance that *Faragher* places upon internal investigations essentially elevates participation in such investigations into a procedural prerequisite for Title VII enforcement. . . . Especially when the issue under investigation is sexual harassment by a supervisor, employees need all the reassurance that they can get before they will come forward."), 6 ("Coverage under the participation clause would remove fear of retaliation as an impediment to participation in an employer's internal investigation of sexual harassment. It would, therefore, promote enforcement of Title VII by removing a potential barrier to the EEOC's eventual involvement.")

protections did not come into play until *after* a lawsuit (or, in this case, an EEOC charge) was filed.

> [Such a limitation] will allow an employer, on learning that it is about to be sued for FLSA violations, to retaliate against employees with information needed for the lawsuit. That result . . . can be expected "to dry up legitimate sources of information . . . , to impair the functioning of the machinery provided for the vindication of the employees' rights and, probably, to restrain employees in the exercise of their protected rights." *NLRB v. Electro Motive Mfg. Co.*, 389 F.2d 61, 62 (4th Cir. 1968).[14]

II. THE DECISION OF THE SIXTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

In the other courts of appeals, unlike the Sixth Circuit, the EEOC's interpretation of section 704(a) is largely unquestioned.

In *Cardenas v. Massey*, 269 F.3d 251 (3d Cir. 2001), the plaintiff alleged that he had been retaliated against because he "offered to support [another individual's] EEO complaint" and supported the complaint of another. 269 F.3d at 260. The plaintiff had merely offered to be a witness in connection

---

[14]Brief for the Secretary of Labor as Amicus Curiae, *Ball v. Memphis Bar-B-Q Company, Inc.*, 228 F.3d 360 (4th Cir. 2000), No. 9901261, pp. 10-11 (1999 WL 33636931).

with an in-house investigation.[15] The district court dismissed the retaliation claim on the ground that the plaintiff "had not shown that he engaged in a protected activity." 269 F.3d at 263. The Third Circuit reversed, holding that the plaintiff's "cooperation in the complaints of . . . other individuals" constituted protected activity." *Id.*

In *Evans v. City of Houston*, 246 F.3d 344 (5th Cir. 2001), the plaintiff alleged that he had been retaliated against for testifying at the grievance hearing of another city employee; Evans had not volunteered to appear, but was required by subpoena to do so. The Fifth Circuit held that that testimony was protected activity under section 704(a), rejecting the city's contention that "[i]nternal grievance procedures are not 'protected activities' under Title VII." 246 F.3d at 352 n. 7.

> Evans was subpoenaed to testify at [the] grievance hearing . . . and Evans did appear and testify. The grievance hearing concerned [the other worker's] Title VII claims of discrimination. . . . If an employee has "'made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing' under Title VII," the employee has engaged in a protected activity. The district court was

---

[15] "[The person who filed the in-house complaint] told [a manager] that Cardenas had offered to be a witness for [the complainant] regarding [his] pending in-house EEO complaint. [The manager] summoned Cardenas and [another employee] to [his] office, and upon their arrival announced an intention to impose substantial disciplinary sanctions upon Cardenas while vigorously berating him for offering to assist [the complainant]." Brief for Appellant, *Cardenas v. Massey*, No. 00-5225, p. 23. The employer on appeal did not dispute this account of those events.

> therefore correct to find that Evans had [engaged in protected activity.]

246 F.3d at 352-53 (citation omitted).

In *Scott v. County of Ramsey*, 180 F.3d 913 (8th Cir. 1999), the Eighth Circuit upheld a jury verdict finding unlawful retaliation based on the actions of the plaintiff in cooperating with a sexual harassment investigation. "Scott was ordered to give a statement in an internal investigation regarding a sexual harassment claim that had been filed by another . . . deputy." 180 F.3d at 916. "Scott gave a recorded statement . . . that confirmed the inappropriate comments [complained of, and] stated he was sure that [a named supervisor] was aware of the behavior." *Id.* Scott alleged, and the jury found, that he was "terminated in retaliation for participating in a protected activity." *Id.* The Eighth Circuit upheld that finding. In *Hoffman v. Rubin*, 193 F.3d 959, 963-64 (8th Cir. 1999), the Eighth Circuit held that answering questions from "internal-affairs investigators" concerning alleged sexual harassment, and responding to questions from the press about that problem, constituted protected activities. See *Kempcke v. Monsanto Co.*, 132 F.3d 442, 446 (8th Cir. 1998) (providing documents to attorney is protected activity).

In *EEOC v. Total Systems Services, Inc.*, 221 F.3d 1171 (11th Cir. 2000), the Eleventh Circuit concluded that cooperation with an internal investigation is not protected activity within the scope of the participation ~~clause~~, but held that such cooperation could be protected activity under the opposition clause. In the circumstances of that case, however, the court held that the employer's actions were not

motivated by an unlawful purpose.[16] In response to a petition for rehearing, Judge Edmondson, who had authored the original panel decision, emphasized that the panel had held that opposition clause can apply to cooperation with an internal investigation:

> [T]he panel's decision does not hold (nor does it suggest) that a retaliation claim is impossible unless someone has first filed an applicable EEOC complaint. To read the opinion differently is inaccurate. We recognize that a plaintiff--in circumstances similar to those in this case, that is, a private employer's internal investigation with no government involvement--might have protection under Title VII and that this protection would flow from the "opposition clause" of the Act. . . . Applying the law as the panel does, may significantly advance the fulfillment of Title VII's goals by encouraging employers to . . . engage in self-examination, and to resolve-- . . . internally. . . . -- disputes involving claims of discrimination . . . without too much fear (*so long as the employer acts honestly*) of potential, troublesome and costly litigation. . . . An employee who participates in an employer's own internal investigation of discrimination *is* within the scope of the opposition clause and can be protected by the clause: for example, an employer cannot throw up just a pretext and get away with punishing an employee for speaking out.

---

[16] The panel concluded the evidence showed that the plaintiff had been dismissed, not for having participated in the internal investigation, but because the employer believed she had lied to the investigators.

240 F.3d at 904-05 (emphasis added). Judge Edmondson's reiteration of the panel holding is regarded is authoritative in the Eleventh Circuit. *E.g., MacLean v. City of St. Petersburg*, 194 F. Supp. 2d 1290, 1298 (M.D.Fla. 2002).

The holding of the Sixth Circuit in the instant case that the opposition clause of section 704(a) protects only "active" opposition (App. 7a) was emphatically rejected by the Seventh Circuit in *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996). In *McDonnell* in the plaintiff at issue, Thomas Boockmeier, was retaliated against for simply doing nothing at all. Two female workers, both subordinates of Boockmeier, had filed discrimination charges. A higher ranking official warned the women that if they did not withdraw their charges, the employer would punish Boockmeier "for failing to control his subordinates." *McDonnell v. Cisneros*, 1995 WL 110131 at * 2 (N.D.Ill. 1995); see 84 F.3d at 258. The employer never ordered Boockmeier to direct the women to withdraw the charges, but evidently hoped he would encourage them to do so in order to avoid reprisals. Boockmeier took no action, and the women did not withdraw their complaints. The employer then retaliated against Boockmeier by permanently transferring him from Chicago to Washington, and told Boockmeier the transfer was being imposed because of his failure to persuade the women to do so. 84 F.3d at 258. The Seventh Circuit held that section 704(a) protected even purely passive opposition. Judge Posner explained:

> [Section 704(a)] forbids retaliating against an employee "because he has opposed any practice made an unlawful employment practice" by Title VII. Several courts, including our own, hold that assisting another employee with his (in this case her) discrimination claim, as well as other endeavors to

> obtain an employer's compliance with Title VII, is protected "opposition conduct." . . . It is true that there are cases of *active* opposition. Boockmeier's opposition was *passive*. . . . Passive resistance is a time-honored form of opposition, however, and it would be very odd to suppose that Congress meant a form of behavior that straddles what the cases . . . call "opposition" and "participation" conduct to fall between the stools.

84 F.3d at 262 (emphasis added).

III. THE DECISION OF THE SIXTH CIRCUIT WILL SERIOUSLY IMPEDED ADMINISTRATION OF TITLE VII

The holding of the Sixth Circuit in this case is far more than a rule for deciding Title VII retaliation cases; that holding will predictably shape the actions of the large numbers of employees and employers in Michigan, Ohio, Kentucky and Tennessee. As this Court has expressly recognized, Congress has enacted anti-retaliation statutes because it concluded that employees are likely to refuse to disclose information about violations of federal law if they can be fired or otherwise discriminated against in reprisal. *Burlington Northern and Santa Fe Rwy. Co. v. White*, 126 S. Ct. 2405, 2414 (2006)(Title VII); *Jackson v. Birmingham Bd. of Education*, 544 U.S. 167, 180 (2005) (Title IX); *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) (NLRA); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (FLSA).

Workers of ordinary prudence would be likely to avoid cooperating with a sexual harassment internal investigation if they knew they could be fired for doing so, certain as most

will be that such cooperation will anger the alleged harasser, who usually is a supervisor and who all too often is the witness's own supervisor. "[E]mployees would have a disincentive to cooperate, if their participation in internal investigations is not protected." *EEOC v. Total System Services, Inc.*, 240 F.3d 899, 803 n. 7 (11th Cir. 2001) (Barkett, J., dissenting from denial of en banc rehearing). "Placing a voluntary witness into this kind of legal limbo would impede remedial mechanisms by denying interested parties 'access to the unchilled testimony of witnesses.'" *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 175 (2d Cir. 2005) (citation omitted).

"If [employers] were permitted to retaliate freely, individuals who witness discrimination would be loath to report it, and all manner of . . . violations might go unremedied as a result." *Jackson v. Birmingham Bd. of Education*, 544 U.S. 167, 180 (2005). Under Title VII whether an employer is legally responsible for sexual or other harassment often turns on whether the employer knew that the harassment was occurring. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 760 (employer liable for negligent failure to correct harassment by co-workers), 765 (employer liable for harassment by supervisor if employer failed to exercise care to correct harassment) (1998). If witnesses to unlawful harassment are unwilling to cooperate with an internal investigation, and the employer as a result is able to show it did not learn of the harassment, both private claimants and the EEOC itself may be unable to obtain redress for that harassment. See *Jackson v. Birmingham Bd. of Education*, 544 U.S. 167, 180 (2005) ("Without protection from retaliation, individuals who witness discrimination would likely not report it, indifference claims would be short-circuited, and the underlying discrimination would go unremedied.") As this case and others like it well illustrate,

many harassment victims who might be reluctant to file formal complaints on their own initiative would be willing to provide candid answers in response to an internal investigation; that often critical source of information would be cut off if cooperation with such an investigation could lawfully lead to dismissal.

The decision below also creates significant and undesirable incentives for those harassment victims who do decide to file some sort of a formal complaint. Because relevant witnesses would have good reason to withhold cooperation from an employer's own internal investigation, a complaint to the employer itself may well be ineffective. Worse yet, if the employer--for want of corroborating information-- does not conclude that harassment occurred, and as a consequence does not take steps to end the harassment, the victim may have no claim, because-- in the absence of that corroboration--the employer's inadequate response may be held reasonable. *E.g., Jackson v. County of Racine*, 474 F.3d 493 (7th Cir. 2007). Given that situation, a harassment victim would be well advised to bypass the employer's own corrective processes and instead proceed at once to file a Title VII charge with the EEOC. Forcing sexual harassment victims to do so, however, would significantly increased the caseload of an already over-burdened EEOC.

Finally, the decision below provides employers with an entirely legal manner in which they can punish, and deter, employees who might provide information that would support sexual harassment claims by their co-workers. There is in the Sixth Circuit today a well-defined window of opportunity during which an employer is free to retaliate against witnesses or potential witnesses; reprisals are entirely lawful until and unless a related Title VII charged is filed with the EEOC or the potential witness files his or her own formal internal

complaint. A witness lawfully dismissed at the internal investigation stage could be unavailable by the time a case gets to trial, other workers--aware of the fate of their colleague--may well be deterred from cooperating at later stages of the Title VII process (even though legal protections would then apply) and the original complaining party will have little ability, reason or standing to try to prove at her own trial that internal-investigation witness was (lawfully) dismissed for a retaliatory purpose.

The Sixth Circuit decision in this case also creates an immediate administrative problem for the EEOC. The EEOC web site (eeoc.gov), which is visited more than 10 million times a year, is a critical source of information for employees. An employee who opens the EEOC home page and clicks on "retaliation" is shown a short summary of employee rights which categorically assures the viewer that he or she cannot be fired or otherwise retaliated against for taking part in an internal investigation.[17] That assurance serves the salutory purpose of encouraging workers to provide information to company officials, cooperation of great importance to sexual harassment investigations under *Faragher* and *Ellerth*.

But for the millions of employees in the Sixth Circuit, that categorical EEOC assurance is now flatly wrong. In regrettably similar language, the EEOC web site assures employees they are protected for "[c]ooperating with an

---

[17] EEOC, "Retaliation" (undated). This interpretation of section 704(a) and similarly worded anti-retaliation provisions is available at http://www.eeoc.gov/types/retaliation.html, visited May 23, 2007. *See* text at n. 4, *supra*.

internal investigation"[18], while the opinion below holds, to the contrary, that "cooperation with Metro's investigation . . . is not the kind of overt opposition that we have held is protected under Title VII." (App. ---). Unlike other portions of the EEOC web site, which may be relied on primarily by attorneys or judges, the Commissions's guidance regarding what is and is not protected activity provides essentially legal advice on which employees themselves can and do rely in deciding how to respond to sexual harassment.

In the Sixth Circuit today no responsible attorney or labor union would assure a worker there that he or she cannot lawfully be fired for cooperating with an internal investigation. If, however, the EEOC responds to this problem by deleting participation in internal investigations from its public list of protected activities, workers outside the Sixth Circuit may be needlessly deterred from taking part in those investigations. The EEOC could, of course, provide state-by-state guidance (employees in general would not know in which circuit they are located), distinguishing states in circuits where cooperation is protected from states where cooperation is not protected and from states in which the law may now be unclear. But the resulting crazy-quilt pattern, while accurate, would graphically depict precisely the sort of inter-circuit division which warrants review by this Court.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

---

[18] *Id.*

In the alternative, the Solicitor General should be invited to file a brief in this case expressing the views of the United States.

Respectfully submitted,

ANN BUNTIN STEINER*
Steiner & Steiner
214 Second Avenue, N.
Suite 203
Nashville, TN 37201-1644
(615) 244-5063

ERIC SCHNAPPER
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

*Counsel of Record
Counsel for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-5258

[Filed March 1, 2007]

VICKY S. CRAWFORD,
Plaintiff-Appellant,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,
Defendant-Appellee,

GENE HUGHES, DR., ET AL.,
Defendants.

BEFORE: BOGGS, Chief Judge; DAUGHTREY, Circuit Judge; and MILLS,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of

* Hon. Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-5258

[Filed November 14, 2006]

VICKY S. CRAWFORD,
Plaintiff-Appellant,

v.

METROPOLITAN GOVEkNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,
Defendant-Appellee,

GENE HUGHES, DR.; PEDRO GARCIA, DR.,
Defendants.

On Appeal from the United States District Court for the Middle District of Tennessee

Before: BOGGS, Chief Judge; DAUGHTREY, Circuit Judge; MILLS, District Judge.*

* The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

PER CURIAM. Vicky S. Crawford, a former employee of the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro"), appeals the district court's grant of summary judgment against her claims for retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). Because we find that there is no genuine issue of material fact and that Metro is entitled to judgment as a matter of law, we affirm the grant of summary judgment.

I

As this case is before us on an appeal of a grant of summary judgment, we state the facts in the light most favorable to the plaintiff. *See Hopson v. DaimlerChrysler Corp.*, 306 F.3d 427, 432 (6th Cir. 2002).

Vicky Crawford had worked for Metro for thirty years before being fired in November of 2002. Crawford alleges that the situation that led to her firing arose in the fall of 2001, when Metro hired Dr. Gene Hughes as the employee relations director for the Metro School District. As employee relations director, Hughes was responsible for, *inter alia,* investigating complaints of discrimination. In May 2002, an attorney for the Metro Legal Department contacted the Human Resources Department after Jennifer Bozeman, an attorney with Metro Legal, learned from another Metro employee that there were several employees within the administrative offices that had expressed concern about specific incidents of inappropriate behavior by Hughes. Because Hughes would normally have been responsible for investigating complaints of sexual harassment, this complaint was instead brought to the attention of Dr. Pedro Garcia, the director of schools. Metro then assigned Veronica Frazier, the assistant director of human resources, to investigate the

complaint. In carrying out the investigation, Frazier contacted employees who worked with Hughes in the Metro administrative offices and asked them to come to her office so that she could interview them. One of the employees so approached was Crawford.

In July 2002, Crawford went to the legal department as requested and Frazier questioned her about Hughes. Crawford told the investigators that Hughes had sexually harassed her and other employees.[1] According to Crawford, she believed that she was exercising her rights under federal law when she informed Frazier of Hughes's actions. Frazier's investigation concluded that Hughes had engaged in inappropriate and unprofessional behavior, though not to the extent of Crawford's allegations. It appears that no disciplinary actions was taken against Hughes; the investigators did recommend training and education for the staff.

According to Crawford, during the investigation, three employees made statements that Hughes had engaged in sexually inappropriate conduct, and after the sexual harassment investigation, these three employees were immediately investigated on other grounds and all promptly discharged. Crawford herself was terminated in January 2003 after having been accused of embezzlement and drug use, charges which she states were "ultimately found to be

---

[1] Specifically, Crawford stated that Hughes "had asked to see her titties on numerous occasions," that she would say "Hey Dr. Hughes, What's up?" and he would "grab his crotch and state 'you know what's up,'" that he would "approach her window and put his crotch up to the window and ask to see her titties all at the same time," and that one time, "Hughes came into her office and she asked him what she could do for him and he grabbed her head and pulled it to his crotch." *Br. of Appellant* at 7. *See also* JA 44-45.

unfounded." In June 2003, Crawford filed a charge of discrimination with the EEOC alleging retaliation, and after receiving her notice of right to sue, she brought this suit.

II

We review a district court's grant of summary judgment *de novo,* using the same Rule 56(c) standard as the district court. *Hansard v. Barrett,* 980 F.2d 1059, 1061 (6th Cir. 1992). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 466 (6th Cir. 2003). In deciding a motion for summary judgment, we must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party. *Ibid.*; *Hopson v. DaimlerChrysler Corp.*, 306 F.3d 427, 432 (6th Cir. 2002).

III

Title VII provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of [its] employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter ["the opposition clause"], or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter ["the participation clause"]." 42 U.S.C. § 2000e-3(a). To establish a *prima facie* case of unlawful retaliation under Title VII, Crawford must demonstrate by a preponderance of the evidence that: "(1) [she] engaged in activity that Title VII protects; (2) defendant

knew that [she] engaged in this protected activity; (3) the defendant subsequently took an employment action adverse to the plaintiff; (4) a causal connection between the protected activity and the adverse employment action exists." *Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 542 (6th Cir. 2003). Upon appeal, Crawford claims that her actions during the internal investigation constitute both *opposition* to a practice made unlawful by Title VII and *participation* in an investigation under Title VII, and that she therefore engaged in activity that Title VII protects. As did the district court, we hold that precedent compels a contrary conclusion.

First, Crawford's actions do not constitute opposition under the meaning of the opposition clause. We have enumerated the types of activities that constitute opposition under Title VII: "complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices; refusing to obey an order because the worker thinks it is unlawful under Title VII; and opposing unlawful acts by persons other than the employer – e.g., former employers, union, and co-workers." *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000). The general idea is that Title VII "demands active, consistent 'Opposing' activities to warrant . . . protection against retaliation." *Bell v. Safety Grooving and Grinding, LP*, 107 F. App'x 607, 610 (6th Cir. 2004).

Crawford's actions consisted of cooperating with Metro's investigation into Hughes by appearing for questioning at the request of Frazier and, in response to Frazier's questions, relating unfavorable information about Hughes. Crawford does not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her

firing. This is not the kind of overt opposition that we have held is required for protection under Title VII.

Second, Crawford's participation in an internal investigation initiated by Metro in the absence of any pending EEOC charge is not a protected activity under the participation clause. We have held that "Title VII protects an employee's participation in an employer's internal investigation into allegations of unlawful discrimination where that investigation occurs pursuant to a pending EEOC charge." *Abbott,* 348 F.3d at 543. In Crawford's case, however, no EEOC charge had been filed at the time of the investigation or prior to her firing; the investigation was internal and was prompted by an informal internal statement. Courts have generally held that the participation clause does not protect "an employee's participation 'in an employer's internal, in-house investigation, conducted apart from a formal charge with the EEOC'; at a minimum, an employee must have filed a charge with the EEOC or otherwise instigated proceedings under Title VII." *Ibid.* (quoting *EEOC v. Total Sys. Serv., Inc.,* 221 F.3d 1171, 1174 n.2 (11th Cir. 2000)); *Brower v. Runyon,* 178 F.3d 1002, 1006 (8th Cir. 1999); *Vasconcelos v. Meese,* 907 F.2d 111, 113 (9th Cir. 1990); *Goldberg v. Media General, Inc.,* 2003 U.S. Dist. LEXIS 13961, 2003 WL 21920923 at *3 (E.D, Tenn. June 18, 2003).

Crawford argues that we should break from the general trend requiring a formal EEOC charge to have been filed or the machinery of Title VII otherwise invoked before the participation clause takes effect. Crawford points to the Supreme Court's decision in *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998), which created an affirmative defense against an employer's vicarious liability for sexual harassment by its employees

when: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 805-07. Crawford hypothesizes that after *Faragher*, an employer could implement formal sexual harassment policies and reporting requirements, investigate complaints made to management, and then such investigations would serve as an affirmative defense to vicarious liability arising out of claims of sexual harassment. She then argues that if the participation clause does not protect participation in internal investigations made in the absence of an EEOC charge, employees called in such investigations will know that they may be fired if they testify negatively, and will stay silent. She concludes that employers, lacking corroborating witnesses, will not take action to remedy sexual harassment, while being simultaneously shielded from vicarious liability by the *Faragher* affirmative defense.

As an initial matter, this foreboding scenario is predicated upon a lax reading of *Faragher*. In order to be entitled to an affirmative defense, an employer must exercise "reasonable care." *Ibid.* Certainly, a policy or practice of firing a person who testified negatively during an investigation into complaints of sexual harassment would not be "reasonable." Courts have held that an anti-harassment policy designed to deter sexual harassment can help an employer meet its burden as to the first element of the *Faragher* test only if the policy is "both reasonably designed and reasonably effectual" and not administered "in bad faith." *See, e.g., Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999). A policy of firing any witness that testified negatively during an internal investigation would certainly constitute bad faith; even an

instance of an allegedly unjustified firing would put the *Faragher* defense at risk.

This court has stated that the purpose of Title VII's participation clause "is to protect access to the machinery available to seek redress for civil rights violations and to protect the operation of that machinery once it has been engaged. Accordingly, any activity by the employee prior to the instigation of statutory proceedings is to be considered pursuant to the opposition clause." *Booker v. Brown and Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1313 (6th Cir. 1989). The impact of Title VII on an employer can be onerous. By protecting only participation in investigations that occur relative to EEOC proceedings, the participation clause prevents the burden of Title VII from falling on an employer who proactively chooses to launch an internal investigation. Expanding the purview of the participation clause to cover such investigations would simultaneously discourage them. We will not alter this limit delineated by the language of Title VII and recognized by this court and others.

IV

Accordingly, for the reasons set out above, we AFFIRM the district court's grant of summary judgment.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

No. 3:03-0996

[Filed January 6, 2005]

VICKY S. CRAWFORD	)
	)
v.	)
	)
THE METROPOLITAN GOVERNMENT OF NASHVILLE/DAVIDSON COUNTY, TENNESSEE	)

JUDGE CAMPBELL

ORDER

Pending before the Court is Defendant's Motion for Summary Judgment (Docket No. 51). For the reasons stated in the accompanying Memorandum, Defendant's Motion is GRANTED, and this action is DISMISSED. The jury trial set for May 3, 2005, and file pretrial conference set for April 25, 2005, are canceled.

IT IS SO ORDERED.

/s/
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

No. 3:03-0996

[Filed January 6, 2005]

VICKY S. CRAWFORD	)
	)
v.	)
	)
THE METROPOLITAN GOVERNMENT OF NASHVILLE/DAVIDSON COUNTY, TENNESSEE	)

JUDGE CAMPBELL

MEMORANDUM

Pending before the Court is Defendant's Motion for Summary Judgment (Docket No. 51). For the reasons stated herein, Defendant's Motion is GRANTED, and this action is DISMISSED.

FACTS

Defendant Metropolitan Government of Nashville/Davidson County ("Metro") is the sole remaining Defendant in this action. The three remaining claims against Metro are Plaintiff's Title VII and THRA retaliation claims and Plaintiff's Whistleblower Act claim. *See* Docket No. 23 (dismissing Plaintiff's sexual harassment claims and all claims against Defendant Garcia).

Plaintiff alleges that she was an employee of Metro for more than 30 years as a payroll coordinator. She asserts that, in the fall of 2002, a potential sexual harassment complaint arose against Dr. Gene Hughes, then Director of Employee Relations for the Metro Public School System. Plaintiff contends that, in the course of the internal investigation of the complaint against Dr. Hughes, Metro officials questioned Plaintiff concerning her knowledge of any inappropriate physical conduct or behavior by Dr. Hughes. Plaintiff claims that she informed the investigators of highly inappropriate words and actions by Dr. Hughes.

Plaintiff alleges that, in retaliation for her cooperation and participation in the investigation of Dr. Hughes, Defendant Metro suspended and ultimately terminated her from her job. Plaintiff asserts that she was fired in retaliation for exercising protective rights, in violation of Title VII and the THRA. In addition, Plaintiff contends that the actions of the Defendants violated Tennessee's Whistleblower Act.

Defendant Metro has moved for summary judgment, contending that Plaintiff did not participate in "protected activity" under Title VII and the THRA and, therefore, cannot establish a retaliation claim. Defendant also asserts that Plaintiff cannot show that the persons making the decision to

suspend and then terminate her employment were aware of her statements to the sexual harassment investigators. Finally, Defendant argues that, even if Plaintiff could establish a *prima facie* retaliation claim, Defendant had legitimate, nondiscriminatory reasons for its actions, which Plaintiff cannot show to be pretextual.

SUMMARY JUDGMENT

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 466 (6th Cir. 2003). In deciding a motion for summary judgment, the court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party. *Id.; Hopson v. DaimlerChrysler Corp.*, 306 F.3d 427, 432 (6th Cir. 2002).

To prevail, the non-movant must produce specific evidence that demonstrates there is a genuine issue of material fact for trial. *Meyers*, 341 F.3d at 466. A mere scintilla of evidence is insufficient; there must be evidence on which the jury could reasonably find for the non-movant. *Id.* The non-moving party may not rest on mere allegations but must set forth specific facts showing that there is a genuine issue for trial. *Hopson*, 306 F.3d at 432.

TITLE VII AND THE THRA

In order to establish a claim for retaliation, Plaintiff must show that (1) she engaged in protected activity; (2) Metro knew that she engaged in this protected activity; (3) Metro

subsequently took an employment action adverse to Plaintiff; and (4) a causal connection between the protected activity and the adverse employment action exists. *Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 542 (6th Cir. 2003).

Defendant first contends that Plaintiff cannot establish the first element of her retaliation claim because Plaintiff's statements to Metro's internal investigators concerning the alleged sexual harassment were not "protected activity" as that term applies under Title VII and the THRA.[1]

Title VII protects an employee's participation in any manner in an investigation, proceeding or hearing under Title VII. 42 U.S.C. § 2000e-3(a). The Sixth Circuit has held that "Title VII protects an employee's participation in an employer's internal investigation into allegations of unlawful discrimination *where that investigation occurs pursuant to a pending EEOC charge." Abbott,* 348 F.3d at 543 (emphasis added). Other courts have also held that protected activity under Title VII does not include participation in internal investigations. *Goldberg v. Media General, Inc.*, 2003 WL 21920923 at * 3 (E.D. Tenn. June 18, 2003) and cases cited therein; *Equal Employment Opportunity Comm'n v. Total System Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000) (Title VII does not include participating in internal, in-house investigation apart from formal charge with EEOC); *Metzger v. City of Leawood*, 144 F. Supp.2d 1225, 1258 (D. Kan. 2001) (same).

---

[1] The THRA provision regarding "protected activity" mirrors that of Title VII and, thus, will be analyzed in the same way. Tenn. Code Ann. § 4-21-301(1).

The cases relied upon by Plaintiff on this issue are distinguishable because they all dealt with the "opposition" clause of the statute; that is, the part that prohibits retaliation for opposing a practice made unlawful by the statute. In the cases relied upon by Plaintiff, *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304 (6th Cir. 1989),[2] *Warren v. Ohio Dept. of Public Safety*, 2001 WL 1216979 (6th Cir. Oct. 3, 2001),[3] *Johnson v: University of Cincinnati*, 215 F.3d 561 (6th Cir.2000),[4] and *Mulvin v. City of Sandusky*, 320 F. Supp.2d 627 (N.D. Ohio 2004),[5] the plaintiffs initiated investigations by filing complaints or reporting allegedly unlawful conduct. Here, Plaintiff merely answered questions by investigators in an already-pending internal investigation, initiated by someone else. In her Complaint, Plaintiff alleges that she fully cooperated with Metro's investigation, that she participated in the investigation, that she was questioned by the investigators, that she testified unfavorably to Dr. Hughes. There is no allegation that she instigated or initiated any

---

[2] In *Booker*, the court actually held that instigation of proceedings leading to the filing of a complaint or a charge, including a visit to a government agency to inquire about filing a charge, is a prerequisite to protection under the participation clause. *Booker*, 879 F.2d at 1313.

[3] The *Warren* court found it unnecessary to decide whether an internal investigation is protected activity under the participation clause. *Warren*, 2001 WL 1216979 at ** 4.

[4] In *Johnson*, the court held that to establish a claim of retaliation under the participation clause, the plaintiff had to show that the defendants discharged him because he filed a claim with the EEOC. *Johnson*, 215 F.3d at 581.

[5] *Mulvin* is the only one of these cases decided after *Abbott* and *Mulvin* does not mention the participation clause.

complaint. Her conduct falls under, if anything, the purview of the participation clause, not the opposition clause.

For these reasons, Plaintiff cannot establish that she engaged in protected activity under Title VII and the THRA. Thus, she cannot establish a retaliation claim under those statutes. The Court need not address Defendant's other arguments concerning these claims.

WHISTLEBLOWER ACT

Having dismissed Plaintiff's federal law claim, the Court declines to exercise its supplemental jurisdiction over Plaintiff's state law claim, 28 U.S.C. § 1367(c)(3), and the Whistleblower Act claim is DISMISSED without prejudice.

CONCLUSION

For the reasons explained above, Defendant's Motion for Summary Judgment (Docket No. 51) is GRANTED, and this action is DISMISSED. The jury trial set for May 3, 2005, and the pretrial conference set for April 25, 2005, are canceled.

IT IS SO ORDERED.

/s/
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE